Shankar a/l Ram Pohumall @ Shankar RP Asnani & Anor v Jeffery Law Siew Su & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG–24–395 OF 2009–II
RHODZARIAH BUJANG JC
4 JUNE 2010

Contract — Formation — Written — Terms, construction of — Whether plaintiffs entitled to legal fees of RM200,000 for writ action — Whether oral representation by first plaintiff enforceable — Whether plaintiffs could claim legal fees for two appeals arising from writ action

Legal Profession — Discharge of solicitors — Application for — Whether plaintiffs could apply to discharge themselves from further acting for defendants in writ action — Rules of the High Court 1980 O 64 r 5(1)

The first defendant, the director of Mastika Jaya Timber Sdn Bhd ('the third defendant') had signed a written retainer engaging the services of the legal firm of Thomas Shankar Ram and Co ('the firm') in respect of a writ action ('the writ action'). Under cl 5 of the written retainer the firm's clients had to pay a non-refundable fee of RM200,000, which did not cover fees, disbursements and costs of any appeal. The partners of the firm ('the plaintiffs') had commenced the instant action against the defendants, their clients, on the grounds that the latter had not paid their legal fees in respect of the writ action and two civil appeals that arose from interlocutory applications filed in that writ action. The plaintiffs have also prayed for a declaration that they were entitled to be discharged as counsel acting for the defendants in the writ action. It was the defendants' case that a partner of the firm, Shankar a/l Ram Pohumall ('the first plaintiff'), had made an oral representation that payment need only be made if the first plaintiff or the firm was successful in obtaining an interlocutory injunction in the writ action. As such the defendants contended that the plaintiffs were not entitled to their legal fees.

Held, allowing the application in part with no order as to costs:

(1) It is an established principle of law that where agreements have been reduced into writing, the court must give effect to the meaning of the words used in the agreement. The present case involved the construction of the written retainer signed by the parties and which bound all the parties (see para 4).

(2) It was clear from cll 5, 9 and 11 of the written retainer that the RM200,000 fee was non-refundable and that it did not cover fees, disbursements and costs of any appeals. The alleged oral representation by the first plaintiff, which was relied upon by the defendants, was also champertous and illegal. Thus, the plaintiffs were entitled to the RM200,000 fee stipulated in the written retainer (see paras 6–7).

(3) Although the RM200,000 fee did not include costs of appeals, the oral instructions given to the plaintiffs to file the appeal were not sufficient to prove that the plaintiffs had been instructed to act for the defendants in the said two appeals. The two letters relied upon by the first plaintiff as evidence of the first defendant's instructions for them to appeal were not sufficient and showed instead that there was a need for a formal appointment from the defendants appointing the plaintiffs as their counsels in the two appeals (see para 8).

(4) As there is a specific provision under O 64 r 5(1) of the Rules of the High Court 1980 for a discharge of a solicitor, the plaintiffs' prayer for a discharge must be made in the writ action between their clients and the other party to that writ action, who had a right to be heard in the application for a discharge. Thus the plaintiffs could not apply for a discharge in this action for it would be like taking away the discretionary power vested on the judge hearing the writ action (see para 10).

[Bahasa Malaysia summary

Defendan pertama, pengarah Mastika Jaya Timber Sdn Bhd ('defendan ketiga') telah menandatangani satu retainer bertulis bagi mendapatkan perkhidmatan sebuah firma guaman iaitu Thomas Shankar Ram & Co ('firma') berkenaan suatu tindakan writ ('tindakan writ'). Di bawah klausa 5 retainer bertulis tersebut, anak guam firma hanya perlu membayar fi yang tidak boleh dikembalikan sebanyak RM200,000, yang tidak meliputi fi, pembayaran dan kos bagi mana-mana rayuan. Rakan-rakan kongsi dalam firma ('plaintif-plaintif') telah memulakan tindakan terhadap defendan, anak-anak guam, atas alasan anak-anak guam tidak membayar fi guaman bagi tindakan writ dan dua rayuan sivil yang berbangkit daripada permohonan interlokutori yang difailkan dalam tindakan writ. Plaintif-plaintif juga memohon bagi satu deklarasi bahawa mereka berhak untuk dilepaskan daripada bertindak sebagai peguambela defendan-defendan dalam tindakan writ. Defendan menghujahkan bahawa rakan-rakan kongsi firma tersebut, Shankar a/l Ram Pohumall ('plaintif pertama') telah membuat representasi lisan bahawa pembayaran hanya perlu dibuat sekiranya plaintif pertama atau firma tersebut berjaya mendapatkan injunksi interlokutori di dalam tindakan writ. Dengan itu, defendan-defendan menghujahkan bahawa plaintif-plaintif tidak berhak ke atas fi guaman mereka.

Diputuskan, membenarkan sebahagian permohonan tanpa perintah untuk kos:

(1) Adalah menjadi suatu prinsip undang-undang yang mana jika perjanjian-perjanjian yang dibuat secara bertulis, mahkamah mestilah menguatkuasakan makna perkataan-perkataan yang digunakan di dalam perjanjian. Kes ini melibatkan pembentukan retainer bertulis yang ditandatangani oleh pihak-pihak yang mengikat pihak-pihak (lihat perenggan 4).

(2) Adalah jelas daripada klausa 5,9 dan 11 retainer bertulis bahawa fi RM200,000 adalah tidak boleh dikembalikan dan ia tidak meliputi fi, pembayaran dan kos mana-mana rayuan. Dakwaan representasi lisan oleh plaintif pertama, yang disandarkan oleh defendan-defendan, adalah juga 'champertous' dan tidak sah. Oleh itu, plaintif-plaintif berhak ke atas fi RM200,000 yang dinyatakan dalan retainer bertulis (lihat perenggan 6–7).

(3) Walaupun fi RM200,000 tidak termasuk kos-kos rayuan, arahan lisan yang diberikan kepada plaintif-plaintif untuk memfailkan rayuan tidak mencukupi untuk membuktikan bahawa plaintif-plaintif telah diarahkan bertindak bagi pihak defendan-defendan di dalam dua rayuan tersebut. Dua surat yang disandarkan oleh plaintif pertama sebagai bukti arahan-arahan defendan pertama adalah tidak mencukupi dan sebaliknya menunjukkan bahawa terdapatnya keperluan bagi suatu lantikan rasmi oleh defendan-defendan untuk melantik plaintif-plaintif sebagai peguambela di dalam dua rayuan tersebut (lihat perenggan 8).

(4) Memandangkan terdapat peruntukan spesifik di bawah A 64 k 5(1) Kaedah-kaedah Mahkamah Tinggi 1980 bagi pelepasan sebagai peguambela, permohonan plaintif untuk pelepasan mestilah dibuat di dalam tindakan writ di antara anak guam dan pihak satu lagi dalam tindakan writ yang mempunyai hak untuk didengar di dalam permohonan bagi pelepasan. Oleh itu, plaintif-plaintif tidak boleh memohon untuk dilepaskan di dalam tindakan ini kerana ia seolah-olah mengambil kuasa budi bicara mendengar hakim bicara mendengar tindakan writ (lihat perenggan 10).]

Notes

For a case on discharge of solicitors, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1584.

For cases on formation of contract in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3712–3849.

Cases referred to

North Eastern Railway Co v Hastings [1900] AC 260 (refd)

Smt Kamla Devi v Seth Takhatmal and another AIR 1964 SC 859 (refd)

Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabalect Sdn Bhd [2000] 3 MLJ 254, CA (refd)

Legislation referred to

Advocates (Practice & Etiquette) Rules 1988 r 28(1)
Advocate Ordinance of Sarawak s 15
Rules of the High Court 1980 O 64 r 5(1)

Shankar Ram (Francis Teron Kadap with him) (Thomas, Shankar Ram & Co) for the plaintiffs.
Lim Heng Choo (Anthony Tai (Anthony Tai Advocates) with him) (Lim & Lim Advocates) for the defendants.
Sunny Si (Si & Associates Advocates) watching brief for Hong Leong Assurance Bhd.

Rhodzariah Bujang JC:

RULING (ENCL 3)

[1] In this action, the plaintiffs who are partners in a legal firm are suing their own client for, inter alia, their legal fees in respect of a writ action No 22–133 of 2009–I and two civil appeals filed in the Court of Appeal arising from interlocutory applications filed in that writ action. There was also a prayer for a declaration that the plaintiffs were entitled to be discharged as counsel acting for the defendants in the said action.

[2] In the course of the life-span of this action, I had written two other judgments — the *first* was in respect of an application ('encl 23') which I delivered on 10 December 2009 in which the defendants herein have applied for an order to disqualify both Mr Thomas Shankar Ram and Mr Francis Teron Kadap from appearing as counsels for their firm citing contravention of r 28(1) of the Advocates (Practice & Etiquette) Rules 1988. At that time the plaintiff named in this action was that of the firm of Messrs Thomas, Shankar Ram & Co, Advocates, not the partners of that firm. The *second*, was also the defendants' application ('encl 99') delivered on 12 March 2010 to convert this action into a writ action, which I declined. In addition, YA Tuan Ravinthran Paramaguru had also written a judgment in respect of the same dispute but in a different writ action ie S-22–229 of 2009–I. The plaintiff in that case was Mastika Jaya Timber Sdn Bhd and defendant, Shankar a/l Ram Pohumall. His Lordship ruled in that case that the defence of the defendant that the plaintiffs are not entitled to their legal fees because it hinged on the promise made by Mr Shankar Ram to the first defendant that he would only be paid if he could successfully obtained an interlocutory injunction against the defendants in the writ action, was against s 15 of the Advocate Ordinance Sarawak ('the Ordinance') and champertous. His Lordship ruled that it was therefore illegal

and unenforceable and also opined in his judgment to the effect that the written retainer signed by the parties is the only evidence of the contract between them and no oral evidence should be allowed to vary its terms.

[3] In all these three previous judgments, the facts outlining the dispute between the parties have been laid out and I would adopt the same here, where relevant. Reduced to its bare form, despite the voluminous affidavits filed in this action, my only task is to decide the issue of the interpretation to be given to the written retainer signed by the first defendant, as director of the third defendant, in this case. In other words, this is simply a matter of construction of a written agreement. It has been mentioned in these earlier judgments that under s 15 of the Ordinance, a retainer must be in writing in order to be valid.

[4] It is an established principle of law that where agreements have been reduced into writing, the court must give effect to the meaning of the words used in the agreement. Many a decisions have applied what was said by Subba Rao J in *Smt Kamla Devi v Seth Takhatmal and another* AIR 1964 SC 859:

> When a court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning for the duty of the court is not to delve into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words, used by him, that is to say his expressed intentions.

[5] Then there is the guidance made by the Lord Chancellor Halsbury in the Privy Council's case of *North Eastern Railway Co v Hastings* [1900] AC 260 at p 263:

> The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.
>
> So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.

[6] These quotations were reproduced exactly as I have laid them out by the Court of Appeal in *Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabalect Sdn Bhd* [2000] 3 MLJ 254 at p 258.

With this principle in mind, I will now examine the retainer in this case. It is exhibited as SR1 to the first affidavit in support of Mr Shankar Ram. The important clauses are reproduced below:

Clause 5

5. As for Paragraph 3.1 above (1st Major Stage) our Professional fees and charges *are an initial non-refundable fee of RM200,000.00* with the following further fees at appropriate stages:

5.1 Daily refresher for all Interlocutory hearings at the rate of RM1,500.00 per day with disbursements and other related costs to be paid by your Company;

5.2 You are to pay all costs and expenses incurred in relation to the above matter where we will have to travel to take instructions, i.e. Hotel and Flight expenses, food, travelling and other necessary expenses and costs;

5.3 All filing fees, postage, courier charges, printing, photocopying, preparing bundles of documents and authorities and other related costs to be paid by your Company within 30 days after Statement of Account is presented to you;

5.4 To pay all other expenses and costs incurred on your instructions;

5.5 You are also to pay all costs of experts (their charges, fees, etc) and agents engaged by you for the matter; You are to pay all expense and costs incurred by witnesses.

Clause 9

9. All fees paid as per the terms and conditions above are agreed fees and *are not refundable* and in the event that the matter/s are settled out of court, action discontinued or for whatever reason;

All fees adumbrated above and herein are agreed fees and charges and guaranteed by and to be paid by Mr. Jeffery Law Siew Su personally.

Clause 11

11. The above matters and our warrant to act *will not cover fees, disbursements and costs for any appeals* and/or other separate actions, contempt proceedings, execution proceedings and winding up proceedings for which *separate fees, disbursements and costs would have to be agreed upon*. (Emphasis added).

[7] It is clear from the above clauses that the RM200,000 fee is non-refundable and that it does not cover fees, disbursements and costs of any appeals. In coming to this conclusion, I agree and adopt the reasonings made by YA Tuan Ravinthran Paramaguru that the oral representation made (even if true) by Mr Shankar that they are only entitled to the RM200,000 if the court granted the third defendant their interlocutory injunction was champertous and illegal. That being the substance of the objection raised by the defendants in this action, I would declare that the plaintiffs are entitled to the RM200,000 fee stipulated in the written retainer.

A THE LEGAL FEES FOR THE TWO APPEALS IN THE COURT OF APPEAL

[8] Bearing in mind what was agreed in the written retainer ie that the RM200,000 fee does not include costs of appeals in cl 11 thereof, and, bearing in mind again, s 15 of the Ordinance on the validity of only written retainers, I am of the view that the oral instructions given to the plaintiffs to file the appeal are not sufficient to for me to grant them the prayers sought in respect of it. Mr Shankar Ram's reliance on two letters (exhs SR26 and SR27 to his affidavit in support) as evidence of the first defendant's instruction for them to appeal is not convincing enough because *firstly*, those two letters were from him to the first defendant enclosing the appeal records and informing him of the hearing of the appeal. They are not written agreements evidencing the same. *Secondly*, in exh SR27, Mr Shankar Ram himself in para two thereof said they were awaiting 'your Company's Resolutions appointing us for matters (1) above' (ie the appeals). Clearly, this shows that the plaintiffs themselves acknowledged that there is a need for a formal appointment for them to act as counsels for the defendants in the appeals. The fact remains however, that the parties envisaged a separate agreement and the law, s 15 of the Ordinance, demands a written one in order for a retainer to be valid and binding on the parties. I have said orally when I delivered my decision in respect of the application for conversion of the writ that the written retainer cuts both ways and as much as the plaintiffs could rely on it so could the defendants.

F THE ENGAGEMENT OF MR MUTHU KUMARAN, A SINGAPOREAN LAWYER

[9] I do not think I need to be drawn into the parties' dispute about the legality or otherwise of the employment of this lawyer as it does not add on or detract from what I have already said respecting the non-refundable RM200,000 fees and non-entitlement of fees for the two Court of Appeal cases. If there is any breach of the immigration law, the matter should be the concern of other authorities but not me; at least not in this judgment.

H THE PRAYER TO BE ENTITLED TO APPLY FOR A DISCHARGE

[10] I agree with Mr Lim Heng Choo for the defendants that there is a specific provision in the Rules of the High Court ie O 64 r 5(1) for an application for a discharge of a solicitor. It must be made in the action itself and served on his client and the other party in the action. The plaintiffs cannot, in my view, apply for their discharge in this action for if I were to grant it, I would be taking away the discretionary power vested on the judge hearing the case to consider whether the discharge should be granted or otherwise and if granted, whether any conditions need to be imposed in allowing the discharge. Only the

judge having conduct of the matter would be in the best position to appraise the needs of the parties before him, having regard to the stage of the proceedings at the time the application is made. Furthermore, there is another party who has a right to be heard in an application for discharge — the defendant in that suit action. The rule says they must also be served with the application for discharge but they are not before me in this action. It would be unfair to make the declaration sought by the plaintiffs without first hearing them out. I would therefore decline to make this particular declaration sought for by the plaintiffs.

[11] Thus, for the reasons stated above, I would grant only prayers A(2) and (3) but not prayers A(1), B(4) and (5) and prayer (C) of the Originating summons which are dismissed. Since only some prayers are allowed and the others were not, I make no order as to costs ie the parties are to bear their own costs.

Applications allowed in part with no order to costs.

Reported by Kohila Neson